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No. 82-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EL PASO COMPANY,

Petitioner,

—v.—

UNITED STATES OF AMERICA and CLARENCE H. ISBEL and JOHN S. REID, Revenue Agents of the Internal Revenue Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF MAIN HURDMAN IN SUPPORT OF THE PETITION FOR CERTIORARI

JACK DAVID*
STEVEN FINELL
DAVID & FINELL
50 Rockefeller Plaza
New York, New York 10020
(212) 757-5529
Counsel for Main Hurdman as Amicus Curiae

*Counsel of Record

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF MAIN HURDMAN IN SUPPORT OF THE PETITION FOR CERTIORARI

Main Hurdman submits this brief as *amicus curiae*, pursuant to Rule 36.1 of the Rules of this Court, with the written consent of all parties.[1] Main Hurdman urges the Court to grant certiorari to decide both questions presented by the Petition.

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1 The Respondents' consent, in a letter from the Solicitor General dated November 10, 1982, and the Petitioner's consent, in a letter from E. Barrett Prettyman, Jr., dated November 12, 1982, are being filed together with this brief.

INTEREST OF MAIN HURDMAN AS AMICUS CURIAE

Main Hurdman is the ninth largest firm of certified public accountants in the United States, with over 500 partners in 80 offices throughout the country and additional offices abroad. Main Hurdman audits the financial statements of over 200 public corporations in the United States, including the Petitioner here. Main Hurdman has 12 offices and audits numerous clients within the Fifth Circuit.

The decision below, by allowing the Internal Revenue Service to have unfettered access to a company's so-called tax pool analysis and supporting memoranda in routine tax audits, directly affects, and seriously impedes, the ability of Main Hurdman and other certified public accountants to perform financial statement audits. If allowed to stand, the Fifth Circuit's decision will discourage corporations from preparing and from sharing with their auditors thorough and searching analyses of the strengths and weaknesses of positions taken on previously filed income tax returns that are likely to be challenged by the IRS because they involve tax issues in the "twilight zone" of the tax world. 682 F.2d at 534. This, in turn, will jeopardize the trustworthiness of audited financial statements by rendering reserves for contingent tax liabilities less accurate and more difficult to audit.

SUMMARY OF ARGUMENT

The questions presented by the Petition transcend in importance the dispute between the litigants about the specific tax pool analysis and back-up papers of The El Paso Company. Their resolution affects not only the El Paso Company and not just companies in the gas industry, but every publicly held company and every auditor of and investor in publicly held companies.

The Fifth Circuit's decision in this case announces three rules of law that advance the important public policy of tax

collection by facilitating the work of the Internal Revenue Service, but which frustrate other important public policies by seriously jeopardizing the accuracy of audited financial statements of publicly held corporations in all industries. First, the decision below holds that confidential tax pool analyses and back-up papers prepared by corporations and their lawyers and auditors—consisting of opinions, legal theories, and evaluations of anticipated disputes and litigation with the IRS about positions taken on previously filed income tax returns—are obtainable by the IRS under 26 U.S.C. § 7602 as a matter of routine, even where the taxpayer's state of mind is not in issue, as where fraud is being investigated. This ruling will necessarily make corporate taxpayers reluctant to commit candid and thorough contingent tax liability analyses to writing and also more cautious in sharing those analyses with their auditors. As the Second Circuit recently noted, *United States v. Arthur Young & Co.*, 677 F.2d 211, 220 (2d Cir. 1982), *petition for cert. filed*, No. 82-687 (Oct. 20, 1982):

> The prejudice involved in exposing to the Service appraisals of a taxpayer's weaknesses and settlement positions on audit is of such proportions that a prudent organization might not be perfectly candid with independent auditors once it knew that the information revealed would be reachable under § 7602.

This, in turn, will expose those who rely upon corporations' audited financial statements to "grave dangers of inaccuracy and untrustworthiness." *Hickman v. Taylor*, 329 U.S. 495, 513 (1947); *United States v. Arthur Young & Co.*, 677 F.2d at 221.

Second, the decision below holds that a corporation's confidential tax pool analysis and back-up papers that identify and evaluate potential IRS claims are not protected by the work product doctrine, in conflict with the Second Circuit decision in *United States v. Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982), *petition for cert. filed*, No. 82-687 (Oct. 20, 1982). Work product protection is warranted because the need for a reserve for contingent tax liabilities and the tax pool analysis necessary

to compute an accurate reserve arises only because tax claims by the IRS are anticipated as being sufficiently probable to render them material.

Third, the decision below broadly holds that where an otherwise privileged opinion of a company's lawyer about anticipated tax claims by the Internal Revenue Service is discussed with or disclosed to the company's auditor, in confidence and for the auditor's evaluation, this constitutes an unconditional waiver of the attorney-client privilege. In so holding, the court below equates confidential communications between a company and its auditor with general dissemination to adversaries and strangers, notwithstanding that the communication with the auditor is for a limited purpose mandated by law and public policy and that the accounting profession imposes its own rule of confidentiality as stringent as that of the legal profession.[2] This broad holding by the Fifth Circuit affects not only tax pool analyses, but other opinions of the company's lawyers that may be necessary for auditors to use in evaluating the adequacy of financial statement treatment and disclosure of material litigation, claims, and contingent liabilities.

This Court should grant the Petition as to both questions presented to evaluate the wisdom of the rulings below that favor society's interest in the collection of revenues at the expense of the national public interest in reliable financial statements and fair markets in securities and at the expense of the policy favoring full and candid discussions between corporations, their attorneys, and their auditors. Because of the devastating effect that the order below will have on the auditing process and the accuracy of financial statements of public corporations, because of the cloud the decision below places on the confidentiality of discussions between corporations, their attorneys, and their auditors, because of the conflict between the rulings made by the Fifth Circuit and those of

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2 AICPA, *Rules of Conduct of the Code of Professional Ethics* Rule 301 (1981).

other circuits, and because the order below was based on incorrect perceptions of the applicable law, this Court should grant the Petition for Certiorari and, upon review, reverse the Fifth Circuit's decision.

ARGUMENT

I. Certiorari Should Be Granted To Consider Whether Tax Pool Analyses Should Be Routinely Obtainable by the Internal Revenue Service Under 26 U.S.C. § 7602

The decision below holds that confidential tax pool analyses and back-up papers are relevant documents routinely obtainable by the Internal Revenue Service under 26 U.S.C. § 7602. This decision conflicts explicitly with the decision of the Tenth Circuit in *United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977), conflicts implicitly with the Eighth Circuit's decision in *United States v. Matras*, 487 F.2d 1271 (8th Cir. 1973), and, in a different respect, conflicts with the decision of the Second Circuit in *United States v. Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982), *petition for cert. filed*, No. 82-687 (Oct. 20, 1982).[3]

A. The Importance of Tax Pool Analyses

A material item on practically every publicly held corporation's financial statement is the provision for income taxes. This provision consists of two parts: First, taxes that the corporation acknowledges are owed as reported on its tax returns and which it has paid or will pay when due; second, a reserve for contingent tax liability that ultimately may be due after the corporation's tax returns are audited by the Internal Revenue Service and all disputed items have ultimately been resolved through litigation or settled in negotiation. To arrive

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3 Until the decision below, each court of appeals that had considered the question had denied the IRS access to confidential tax pool analyses, albeit upon conflicting rationales. An analysis of the conflict among the circuits is set forth in the Petition for Certiorari at 11-16 and will not be repeated here.

at and support the amount of the reserve for contingent tax liability, those who advise the corporation on tax matters—which may be any combination of financial and accounting management, in-house and outside tax counsel, and in-house and outside tax accountants—prepare an analysis that is known by various terms, but commonly called the tax pool analysis. The court below found that the tax pool analysis in this case consists of a "four to five page list of the items believed to be vulnerable to challenge." 682 F.2d at 536.

For each item as to which a challenge is anticipated, the tax pool analysis gives consideration to such issues as the tax advisors' opinions of the merits of the tax issue, the dollar amount involved, the estimated cost of litigation, legal theories that the taxpayer and the IRS might advance in support of their respective positions, opinions as to the probable outcome of the potentially disputed items if litigated in the various forums available, and whether the corporation would be disposed to settle the dispute with the IRS and, if so, for what amount. Based upon this analysis, the corporation's management estimates the amount of the corporation's contingent tax liability and includes a reserve for it in the financial statements. It is the task of the auditor to assess this reserve as part of the audit process,[4] taking into account all of the information available as to how and on what basis it was computed and making his own tax pool analysis as well.

Although the Internal Revenue Service has had statutory power to summon all relevant and material evidence for over 56 years,[5] it has only recently perceived a need for the tax-

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4 AICPA, *Codification of Statements on Auditing Standards* § 110 (1982); Note, *Government Access to Corporate Documents and Auditors' Workpapers: Should We Include Auditors Among the Privileged Few?*, 2 J. Corp. L. 349, 357 (1977).

5 *See* Act of Feb. 26, 1926, ch. 27, §§ 1104(a), 1105(a), 44 Stat. 113, 118 (formerly codified as amended at Internal Revenue Code of 1939 §§ 3614(a), 3615(a)).

payer's own analyses. 682 F.2d at 547 (dissenting opinion below). The IRS's efforts to obtain these analyses have caused a storm of protest by knowledgeable commentators[6] and, until the decision below, have been rejected by every court of appeals that has considered them.[7]

The decision below, by making the self-searching tax pool analysis routinely available to the corporation's principal tax adversary, likely will lead corporations and their tax advisors to disclose as little as possible in their written tax pool analysis and back-up. It also will cause the corporate taxpayer to abbreviate discussion of anticipated tax litigation as much as possible and will drive a wedge between auditors and their clients. *See* Petition for Certiorari at 18-21 and authorities cited therein; *cf. Hickman v. Taylor,* 329 U.S. 495, 511 (1947) ("much of what is now put down in writing would remain unwritten").

Although corporations would prepare and supply auditors with the necessary[8] minimum to enable the auditor to issue a "clean" opinion, the Fifth Circuit's rule will reduce the reliability of the reserves for contingent tax liability reflected on financial statements and make it more difficult for auditors, in

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6 Note, *Government Access to Corporate Documents and Auditors Workpapers: Shall We Include Auditors Among the Privileged Few?,* 2 J. Corp. L. 349 (1977); Hanson & Brown, *CPA's Workpapers: The IRS Zeroes In,* 152 J. Accountancy 68 (1981); Kurtz, *Discussion on "Questionable Positions,"* 32 Tax Law. 13 (1978); Caplin, *Should the Service Be Permitted To Reach Accountants' Tax Accrual Workpapers?,* 51 J. Tax'n 194 (1979).

7 *United States v. Arthur Young & Co.,* 677 F.2d 211 (2d Cir. 1982), *petition for cert. filed,* No. 82-687 (Oct. 20, 1982); *United States v. Coopers & Lybrand,* 550 F.2d 615 (10th Cir. 1977); *cf. United States v. Matras,* 487 F.2d 1271 (8th Cir. 1973).

8 Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78*l*; Regulation S-X, 17 C.F.R. pt. 210. Accruals for unpaid taxes are an integral component of the financial statements required to be filed by registrants with the Securities and Exchange Commission and must be analyzed by the auditor. AICPA, *Codification of Statements on Auditing Standards* §§ 328, 337, 509 (1982).

the public interest, to examine the adequacy of those reserves. Before the balance between the competing interests involved is tipped in favor of aiding the IRS' tax collection efforts, this Court should evaluate the conflicting values and interests that have led other circuits to different conclusions.

B. Tax Pool Analyses Should Not Be Deemed Relevant in a Routine Audit

As the Solicitor General avers with respect to the issue of whether tax pool analyses should be protected by a work product privilege, the issue of whether tax pool analyses should be routinely obtainable by the IRS as relevant under 26 U.S.C. § 7602 "is of major importance to the administration and enforcement of the revenue laws, and to the accounting and legal professions." Petition for Certiorari at 7, *United States v. Arthur Young & Co.*, No. 82-687 (filed Oct. 20, 1982). We agree with the Solicitor General when he states: "This Court should grant certiorari and establish a uniform national rule with respect to the production of such tax accrual workpapers." *Id.*

As this Court has recognized, the Internal Revenue Service has broad power under 26 U.S.C. § 7602 to obtain relevant factual materials pertaining to the determination of tax liability. *E.g., United States v. Bisceglia,* 420 U.S. 141 (1975); *United States v. Powell,* 379 U.S. 48 (1964). However, the tax pool analysis that the IRS is now seeking in corporate audits reveals no facts concerning the taxpayer's tax liability or the transactions giving rise to tax liability that are not already available to the IRS. As the court below acknowledged, the tax pool analysis is not made in the course of preparing the company's tax returns, nor is it a source of the information used in the tax returns or evidence of the company's underlying transactions. 682 F.2d at 537.

The IRS's recently discovered need for tax pool analyses derives solely from its desire to have the corporation's own tax advisors do some of the IRS's thinking for it. The IRS seeks

not facts, but rather the thoughts, opinions, and legal theories of corporate taxpayers and their advisors even where there is no issue to which they might be relevant, such as fraud or the taxpayer's good faith, and solely as a shortcut in the IRS's own analysis—in the words of the court below, to "focus and concentrate the Service's energy." 682 F.2d at 537.[9]

This Court should resolve the question of whether, as the Fifth Circuit ruled below, this is sufficient to satisfy the relevance requirement of 26 U.S.C. § 7602 or whether, as the Tenth Circuit held in *United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977), the tax pool analysis and back-up materials are not relevant materials subject to IRS summons.

C. Tax Pool Analyses and Supporting Work Papers Should Be Protected as Work Product

Fed. R. Civ. P. 81(a)(3) makes the work product doctrine codified in Fed. R. Civ. P. 26(b)(3) applicable to proceedings for enforcement of IRS summonses under 26 U.S.C. § 7602. *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981). In *United States v. Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982), *petition for cert. filed*, No. 82-687 (Oct. 20, 1982), the Second Circuit concluded that the tax pool analysis work papers of outside auditors constitute a form of work product that must be protected from disclosure to the IRS because "the integrity of the [independent] auditing process," *id.* at 221, depends upon management feeling free to be frank and open with their auditors with respect to debatable positions taken on the corporate tax returns that are subject to IRS challenge. *Id.* at 219-20. The Solicitor General acknowledges that the Fifth Circuit decision below, in rejecting work product protection for El Paso's tax pool analysis and back-up papers, is in

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9 To paraphrase this Court's recent observation, 26 U.S.C. § 7602 "was hardly intended to enable [the IRS] to perform its functions . . . on wits borrowed from the adversary." *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) (quoting *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring)).

conflict with the Second Circuit decision and states that the issue of whether such papers are protected from disclosure as work product "is of major importance to the administration of the revenue laws, and to the accounting and legal professions." Petition for Certiorari at 6-7, *United States v. Arthur Young & Co.*, No. 80-687 (filed Oct. 20, 1982).

The majority below reasons that work product protection is not applicable because "the tax pool analysis is not prepared in 'anticipation of litigation,' " 682 F.2d at 542, but rather

> is "[p]repared for financial reporting purposes alone. . . ." Caplin, *IRS Toughens Its Stance on Summoning Accountant's Tax Accrual Workpapers*, J. Tax 130 (Sept. 1980). While the analysis must forecast the cumulative results of IRS audit, settlement, and litigation, the tax pool analysis itself is not prepared to respond to a specific charge by the IRS or to any pending or impending lawsuit. The tax pool analysis is undertaken solely to insure that the corporation sets aside on its balance sheet a sufficient amount to cover contingent tax liability.

682 F.2d at 535.

This reasoning obscures the essence of the tax pool analysis: it must be performed *solely* because tax litigation with the IRS is anticipated. Absent the material threat of IRS claims enforceable by litigation, there would be no need for tax pool analyses for *any* purpose, accounting or otherwise. The likelihood of IRS claims and litigation results not because of any wrongdoing by corporate taxpayers, but because "[t]here are many 'gray areas' in the tax world, twilight zones in which one may only dimly perceive how properly to treat a given accretion to wealth or given expenditure of funds." 682 F.2d at 534.

Therefore, the majority below is mistaken in suggesting that the tax pool analysis is undertaken primarily for financial reporting purposes that are "distant from actual litigation." 682 F.2d at 543. Were it not for the likelihood of tax litigation over the "gray areas" and "twilight zones" in the tax world,

neither the rules of the Securities and Exchange Commission, nor accounting principles, nor auditing standards would require a tax pool analysis to be done. So, it is the fact that litigation is anticipated that spawns the tax pool analysis. From the point of view of auditors, investors, and all those who use financial statements, including company management, it is vital to have a tax pool analysis that is as searching, comprehensive, and frank as possible to determine and review the adequacy of the reserve for contingent tax liabilities—without fear that this analysis will, in the hands of the IRS, be a tool against the company in the anticipated litigation.

The mental processes and analyses which are revealed by tax pool analysis workpapers are at the very core of the protection afforded by the work product doctrine. Even where a party seeking to discover work product materials has satisfied the rigorous standard of showing substantial need and undue hardship, courts nevertheless are enjoined to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or their representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *Upjohn Co. v. United States,* 449 U.S. 383, 399-401 (1981).

The court below passed over these considerations. Nor did it appear to seriously weigh the impact of its decision on audits of reserves for contingent liability for tax and other litigation. Without fairly weighing the conflicting policies involved, the court below simply concluded that society's interest in tax collection is sufficient to require disclosure of a corporation's and its auditor's analyses, legal theories, settlement positions, and opinions about anticipated IRS claims. This Court should grant certiorari to resolve the conflict between the policies involved and to establish a balanced rule that does not frustrate communication between auditors and their clients in evaluating anticipated tax claims.

II. Certiorari Should Be Granted To Consider Whether Confidential Discussion of Privileged Attorney-Client Communications with an Auditor Waives the Privilege

The decision below broadly holds that any discussion between a company and its auditor, or any disclosure to a company's auditor, of privileged communications with the company's lawyers or opinions of the company's lawyers constitutes a waiver of the attorney-client privilege—not only as to the particular items discussed with or disclosed to the auditor, but also as to any other privileged communications dealing with the same subject. The sweeping theory of waiver of privilege adopted by the Fifth Circuit below is not confined to tax pool analyses. It is in conflict with decisions of the Sixth, Eighth, and Ninth Circuits.[10] *See* Petition for Certiorari at 16-17 & n.10. It threatens to cut off or seriously dilute the flow of information to auditors that is essential for auditors to perform their responsibilities in assuring the reliability of financial statements.

In view of the important public policies served by the auditing of financial statements and the important public policies promoted by the attorney-client privilege, *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981), certiorari should be granted to resolve the uncertainties surrounding the privilege which the court below created. As this Court recently observed in *Upjohn*:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying

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10 *United States v. Upjohn*, 600 F.2d 1223 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc); *United States v. Cote*, 456 F.2d 142 (8th Cir. 1972); *Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18 (9th Cir. 1981).

> applications by the courts, is little better than no privilege at all.

Id. at 393. And:

> [B]ecause Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly before us.

Id. at 403-04 (Burger, C.J., concurring in part).

A. The Sweeping Waiver of Privilege Doctrine Adopted Below Impairs the Audit Process

The broad waiver rule announced below profoundly, and adversely, affects the profession of public accountancy and the public interest served by that profession. Certified public accountants, in the course of auditing financial statements, frequently require access to privileged attorney-client materials in order to assess, among other things, the adequacy of a company's financial statement disclosure of material litigation, threatened or asserted claims, legal risks, and other contingencies, as well as the adequacy of reserves provided for these contingencies. If the rule adopted below is followed, continuing to make these privileged materials available to auditors would render them, together with all other attorney-client communications on the same subject, unprivileged. All of these attorney-client communications would then become generally available—not only to the IRS, as in this case, but also to any private party in civil litigation and to any government agency in litigation or administrative proceedings.

This would work an almost total abrogation of a corporation's attorney-client privilege as we know it, contrary to the important policies articulated by this Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Rather than incur this intolerable result, the corporation's only alternative would be

to deny its auditors access to privileged attorney-client communications. This would work to the detriment of the audit process and, ultimately, to the detriment of all who rely upon audited financial statements.

The waiver doctrine adopted below also appears to prejudge an important issue that was not before the court: whether the opinions of counsel regularly furnished in response to auditors' requests for information concerning litigation, claims, and loss contingencies are privileged.[11] It is our understanding that there have been no reported decisions dealing with this important question. We are aware of three unreported lower court rulings that have denied discovery of opinion letters of counsel. *In re Cessna Aircraft Distributorship Antitrust Litigation,* M.D.L. No. 123 (D. Kan. Sept. 18, 1980); *International Business Machines Corp. v. Catamore Enterprises, Inc.*, C.A. No. 5030 (D.R.I. Mar. 19, 1975) ("the 'legal letters and related materials' . . . are of a confidential nature and need not be produced"); *Teberg v. American Pacific International, Inc.*, No. C. 196448 (Cal. Super. Ct. Apr. 19, 1982) ("the relevance of [lawyers' opinion letters] is outweighed by the public policy of promoting candid and full disclosure by counsel to independent accountants or auditors during the audit process and the right of privacy"). We know of no decisions ordering discovery of lawyers' opinion letters to auditors.

B. The Waiver Doctrine Adopted Below Ignores the Confidentiality of Client-Auditor Communications

The waiver doctrine announced below is based upon the false premise that a client's communications with certified public accountants are not, and are not expected to be, confidential. 682 F.2d at 540. From this faulty premise, the majority reasons that discussion of privileged matter with an auditor ends the confidentiality requisite for the continued existence of the attorney-client privilege.

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11 *See generally* AICPA, *Codification of Statements on Auditing Standards* § 337 (1982); ABA, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information* (1975).

We submit that the court below erred in equating client-auditor communications with the disclosure of information to strangers or adversaries. Its ruling ignores the fact that the profession of certified public accountancy is bound by a rule of confidentiality as stringent as that imposed upon the legal profession. AICPA, *Rules of Conduct of the Code of Professional Ethics* Rule 301 (1981) provides: "A member shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client."[12] In the case of tax pool analyses, the IRS itself recognizes that they are communicated by the client *in confidence* to the auditor. I Internal Revenue Manual (Audit) (CCH) § 232.8(4) (May 1982).

The authorities cited by the majority in support of finding the privilege waived, 682 F.2d at 538-39, all involved disclosures of privileged matter to strangers, opponents, or the public generally: *Permian Corp. v. United States,* 665 F.2d 1214, 1219 (D.C. Cir. 1981) (disclosure to SEC); *United States v. Miller,* 660 F.2d 563, 567-68 (5th Cir. 1981) (disclosure to IRS); *United States v. Davis,* 636 F.2d 1028, 1043 n.18 (5th Cir. 1981) (same); *Green v. Crapo,* 181 Mass. 55, 62, 62 N.E. 956, 959 (1902) (public testimony); McCormick, *Evidence* § 93 (E. Cleary 2d ed. 1972) (public testimony). None held that a disclosure limited to a professional engaged by the client and bound to hold the matter *in confidence* destroyed the element of confidentiality.

In finding a waiver, the opinion below also emphasizes that thus far the law has not recognized an evidentiary privilege for client-accountant communications. 682 F.2d at 530-31. But the question here is not whether client-accountant communications are privileged in themselves. Rather, the question is whether sharing a concededly privileged attorney-client communication with an auditor *bound to retain that communication in confidence* renders the attorney-client communication not confidential and thus abrogates the privilege.

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12 Rule 301 goes on to provide that the rule does not affect the accountant's legal obligation to comply with valid judicial process.

C. The Waiver Doctrine Adopted Below Threatens To Abrogate the Attorney-Client Privilege for Corporations

In *Upjohn Co. v. United States*, 149 U.S. 383 (1981), this Court recognized the need to accommodate the requirements of the attorney-client privilege to the reality of corporate life. As Judge Garwood explained in dissent below, 682 F.2d at 551:

> The reality of the matter is that for publicly held companies very little information can properly be held entirely confidential from independent auditors. If we do not take these realities into account in developing and applying theories of waiver of the attorney-client privilege in these situations, there is a substantial danger that the attorney-client privilege for publicly held corporations, so recently reaffirmed in *Upjohn Co. v. United States* [citation] will become nothing but an empty theory.

Another practical reality is the need for companies faced with the threat of claims and litigation by the IRS to draw upon their accountants' expertise as part of the process of obtaining their lawyers' opinion as to potential areas of dispute, the legal theories that each side might advance, and the probable outcome. *Cf. United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (Friendly, J.), which recognized that where an accountant participates in attorney-client communications for the purpose of assisting the lawyer in rendering legal services in tax matters, the accountant's participation does not abrogate the attorney-client privilege. *Id.* at 922. Indeed, Judge Friendly opined that the attorney-client privilege would attach to a communication directly between the client and the accountant, if its purpose was to assist the lawyer in counseling the client. *Id.* at 919, 921-23.

This Court itself should weigh the benefits of protecting attorney-client communications when shared with an auditor in the audit process before such protection is jettisoned in the interest of facilitating tax collection.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACK DAVID*
STEVEN FINELL
DAVID & FINELL
50 Rockefeller Plaza
New York, New York 10020
(212) 757-5529
Counsel for Main Hurdman as Amicus Curiae

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*Counsel of Record